

David P. Schack (State Bar No. 106288)  
david.schack@klgates.com  
Luke G. Anderson (State Bar No. 210699)  
luke.anderson@klgates.com  
K&L GATES LLP  
10100 Santa Monica Blvd.  
Seventh Floor  
Los Angeles, California 90067  
Telephone: (310) 552-5000  
Facsimile: (310) 552-5001

Attorneys for Defendant JOHN J. COTA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

THE CONTINENTAL INSURANCE  
COMPANY,

Plaintiff,

v.

JOHN JOSEPH COTA; REGAL STONE  
LIMITED; FLEET MANAGEMENT  
LIMITED and the *M/V COSCO BUSAN* (aka  
*HANJIN VENEZIA*), LR/IMO Ship No.  
9231743 her engines, apparel, electronics,  
tackle, boats, appurtenances, etc., *in rem*,

Defendants.

Case No. 3:08-cv-2052-SC as related to: 07-  
cv-5800-SC, 07-cv-6045-SC, and 07-cv-5926-  
SC

**NOTICE OF MOTION AND MOTION TO  
STAY CIVIL ACTION PENDING  
RESOLUTION OF CRIMINAL  
PROCEEDING OR, ALTERNATIVELY,  
TO COMPEL ARBITRATION**

Date: September 5, 2008  
Time: 10:00 a.m.  
Ctrm: 1

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 5, 2008, at 10:00 a.m., or as soon thereafter as  
the matter may be heard in Courtroom 1 of the above-entitled court located at 450 Golden Gate  
Avenue, San Francisco, California, Defendant John J. Cota ("Captain Cota") will and hereby does  
move the Court for an order to stay the above-captioned civil action for 120 days or until resolution  
of the criminal action U.S. v. John J. Cota, Case No. CR 08-0160 SI, now pending in the United  
States District Court, Northern District of California, San Francisco Division. In the alternative,

1 Captain Cota will and hereby does move for an order compelling Continental to arbitrate all claims  
2 filed against Captain Cota as required by the insurance policy at issue in the instant litigation and  
3 stay any non-arbitral claims in this action until the arbitration is completed.

4 This Motion is made pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Civil  
5 Local Rules 7-1 and 7-2, and is based upon this Notice of Motion, the following Memorandum of  
6 Points and Authorities, the accompanying Declaration of David P. Schack, the pleadings and papers  
7 on file in this action, and upon such further evidence as may be presented at the hearing on this  
8 matter.

9 DATED this 21st day of July, 2008.

10 Respectfully submitted.

11 K&L GATES LLP

12  
13 By /s/ David P. Schack  
14 David P. Schack  
15 Attorneys for Defendant  
16 JOHN J. COTA  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION AND SUMMARY.**

By this motion, Captain John Cota (“Captain Cota”) seeks an order staying this civil action filed against him by his insurance company, The Continental Insurance Company (“Continental”), for a period of 120 days or until the conclusion of the criminal proceedings that are now pending against him before the Honorable Susan Illston. In the alternative, Captain Cota requests that this Court order arbitration of all claims filed against him by Continental as required by the policy at issue in the instant litigation and stay any non-arbitral claims in this action until the arbitration is completed.

On November 7, 2007, while Captain Cota was on board the container ship M/V COSCO BUSAN (“COSCO BUSAN”) as an advisory pilot, the ship scraped the San Francisco Bay Bridge fendering system, damaging the ship’s hull and fuel tank and causing oil to spill into the San Francisco Bay. Within days of the incident, and certainly by early December 2007, the United States Attorney’s Office began asserting criminal liability against Captain Cota in connection with the COSCO BUSAN incident.

In the pending criminal proceeding, the United States claims that Captain Cota negligently operated the vessel in a manner which violated the Clean Water Act (i.e. caused an oil spill) and the Migratory Bird Treaty Act (i.e. injured or killed protected birds). According to the government, Captain Cota is liable based on ordinary negligence principles under the Clean Water Act and strictly liable under the Migratory Bird Act if he was “operating” a vessel that spilled oil and killed or injured protected wildlife. Because he faces a possible term of imprisonment and substantial monetary damages, Captain Cota has had to devote his time and had to muster all available financial assets to defend himself against these serious charges.

Beginning in December 2007, Captain Cota tendered the defense of the criminal matter to Continental which had issued a primary liability policy to the San Francisco Bar Pilots, including Captain Cota. Continental initially denied any and all obligations to defend or indemnify Captain Cota. On April 21, 2008 – months after Captain Cota’s tender and after forcing Captain Cota to

1 defend himself with no assistance from his insurer, Continental agreed to defend Captain Cota in the  
2 criminal proceeding subject to an omnibus reservation of rights. On that same day, however,  
3 Continental filed the instant civil action, seeking declaratory relief against Captain Cota and the  
4 owners / operators of the COSCO BUSAN in an effort to avoid all of its obligations to Captain Cota.  
5 As such, Continental, which has a special, fiduciary relationship with its insured, Captain Cota, is  
6 now trying to force Captain Cota to fight a “two-front war” against both the government and  
7 Continental (i.e, his own insurer).

8 Obviously, Continental’s tactics are gravely prejudicial to Captain Cota. In the first instance,  
9 it is undisputed that there is an arbitration clause in the Continental policy requiring arbitration of all  
10 claims between Captain Cota and Continental. Thus, Continental never should have filed a  
11 complaint in this Court in the first instance. Captain Cota intends to enforce that arbitration clause  
12 and does not intend to waive in any fashion Continental’s contractual obligation to arbitrate.

13 There is another important consideration at issue here. Under the applicable legal authorities,  
14 Continental should not be allowed to arbitrate or litigate against Captain Cota (or prosecute the  
15 clearly overlapping issues with the other defendants) while the criminal case is pending against  
16 Captain Cota. Continental’s action is based on the exact same incident (the COSCO BUSAN  
17 accident) as the criminal proceedings and directly involves witnesses, facts and issues central to the  
18 criminal action. Continental’s attempt to force a defendant in a criminal proceeding – its *own*  
19 *insured* no less – to defend simultaneously against a civil action involving the same matter violates  
20 core constitutional rights, including the Fifth Amendment’s protection from self-incrimination, and  
21 raises serious questions concerning Continental’s bad faith under California law.

22 Accordingly, Captain Cota requests that this Court stay this civil action for 120 days (or until  
23 the conclusion of the criminal proceedings now set for trial on October 6, 2008 before the Honorable  
24 Susan Illston.)<sup>1</sup> Upon completion of the criminal proceedings and expiration of the stay, Cota will  
25

26 <sup>1</sup> As discussed in Part II, *infra*, on July 17, 2008, Judge Illston severed certain felony claims against  
27 Captain Cota for purposes of trial and ordered that those claims be set for trial after the completion  
28 of the trial of other claims which is set to commence on October 6, 2008. At this time, Captain Cota  
is seeking to stay the within action for 120 days which should be sufficient to allow the completion  
of the trial commencing on October 6, 2008. If and when Judge Illston sets a new trial date for the  
felony claims, Captain Cota may need to seek further relief relating to the stay issue.

1 seek to compel arbitration of the claims between Captain Cota and Continental.<sup>2</sup> While a stay is the  
 2 first and best means of protecting Captain Cota's constitutional rights, if the Court declines to stay  
 3 this action until conclusion of the criminal proceedings, then Captain Cota requests, alternatively,  
 4 that the Court immediately compel Continental to proceed to arbitration pursuant to the terms of the  
 5 Continental insurance policy at issue and stay this action, including any non-arbitral claims  
 6 involving other parties, until conclusion of the arbitration.

## 7 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

8 Captain Cota is a long-standing member of the San Francisco Bar Pilots ("Bar Pilots"), an  
 9 association of approximately 60 pilots authorized to pilot large vessels into and out of the San  
 10 Francisco Bay and its tributaries. On or about January 1, 2007, Continental issued Primary Trip  
 11 Insurance and Pilot's Contingent Legal Liability Policy No. H856049 (the "Continental Policy")  
 12 which insured the Bar Pilots, including Captain Cota. Declaration of David P. Schack ("Schack  
 13 Decl.") ¶ 2, Exhibit "1." The Continental Policy, at Section C.1, provides coverage to Captain Cota  
 14 for, among other things, "legal liabilities arising out of, relating to, directly or indirectly, losses  
 15 and/or damages and/or expenses which result while members of the San Francisco Bar Pilots are  
 16 engaged in the piloting of vessels." *Id.*, ¶ 3, Exhibit "1." The Continental Policy also contains a  
 17 broad arbitration clause requiring Continental to arbitrate all disputes under the policy:

18 "If any dispute arises under this policy the parties hereto shall submit the same to arbitration,  
 19 for which purpose one arbitrator is chosen by the Assurer and one by the Assured. The two  
 20 so chosen, if unable to agree shall select a third as umpire and the award of any two shall be  
 21 final as between the parties. The cost of arbitration, including arbitrator's fees, shall be  
 22 assessed by the arbitrators." *Id.*, ¶ 3, Exhibit "1" (at Section C.10).

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 26 <sup>2</sup> By seeking a stay of the proceedings followed by a motion to compel arbitration, Captain Cota is  
 27 not in any fashion waiving his right to arbitrate. Rather, the fact remains the eventual arbitration  
 28 should not proceed until the completion of the criminal proceedings, and this Court should only  
 address the arbitration issue after completion of the criminal proceedings to ensure that Continental  
 does not seek to prejudice Captain Cota by trying to force the arbitration to proceed in advance of  
 the criminal trial.



On November 7, 2007, Captain Cota was assigned as a Bar Pilot to the COSCO BUSAN for its voyage out of the San Francisco Bay. During the voyage, the COSCO BUSAN scraped the San Francisco Bay Bridge fendering system, damaging the ship's hull and fuel tank and causing oil to spill into the San Francisco Bay. *See* Continental's First Amended Complaint ("FAC"), ¶¶ 21-22.<sup>3</sup>

After the COSCO BUSAN accident, several parties filed civil suits (the "Civil Claims") against Captain Cota. FAC, ¶ 24. Initially, Continental accepted the defense of those Civil Claims and appointed counsel to defend Captain Cota at Continental's expense. FAC, ¶ 28. Thereafter, Continental requested that defendants Fleet Management Limited ("Fleet"), the operator of the COSCO BUSAN, and Regal Stone Limited ("Regal"), the owner of the COSCO BUSAN (Fleet and Regal are collectively referred to as the "Vessel Interests"), assume the defense of Captain Cota pursuant to California Harbors and Navigation Code § 1198. FAC, ¶ 29. After several months, Fleet and Regal did assume the defense of the Civil Claims for Captain Cota but have refused to indemnify him as required by that statute. FAC, ¶ 30.

Shortly after the COSCO BUSAN accident, and certainly by at least early December 2007, the U.S. Attorney's Office began asserting criminal liability against Captain Cota based on his actions while acting as an advisory pilot onboard the COSCO BUSAN. Accordingly, by letter dated December 10, 2007, Captain Cota tendered the defense of the criminal matter to Continental under the Continental Policy. Schack Decl., ¶ 4, Exhibit "2." In correspondence dated February 26, 2008, Continental denied any coverage obligation to Captain Cota based on the "Pollution Exclusion and Buyback Clause" ("Pollution Exclusion") in the Continental Policy which provided coverage for discharge of oil in certain circumstances but excluded coverage for (i) non-accidental occurrences, (ii) occurrences that were either expected or intended by the insured, and/or (iii) the insured's "intentional or willful violation of any government rule or regulation." *Id.*, ¶ 5, Exhibit "3."

On March 17, 2008, the U.S. Attorney filed an information in the matter of United States of America v. Cota, United States District Court for the Northern District of California, Case No. CR

<sup>3</sup> Captain Cota does not admit the veracity of Continental's allegations in the FAC. However, where applicable, Captain Cota cites allegations of the FAC in this factual and procedural background section given that Continental is bound by its own allegations concerning such background.

1 08-00160-JCS (hereinafter the “Criminal Action”) charging Captain Cota with violations of the  
2 Clean Water Act and the Migratory Bird Treaty Act based on his role as an advisory pilot onboard  
3 the COSCO BUSAN and the discharge of fuel into the San Francisco Bay after its collision with the  
4 San Francisco Bay bridge. *Id.*, ¶ 6, Exhibit “4.”<sup>4</sup>

5 In an April 11, 2008 letter, Continental reasserted its denial of coverage based on the  
6 Pollution Exclusion (which barred coverage for intentional acts). *Id.*, ¶ 8, Exhibit “5.” Thereafter,  
7 in a letter dated April 21, 2008, Continental reversed course and accepted Captain Cota’s defense.  
8 *Id.*, ¶ 8, Exhibit 7. Continental did so under a full reservation of rights, including “the right to  
9 withdraw from the defense...for any reason, including but not limited to a judicial declaration that  
10 Continental has no duty to defend.” *Id.* Also on April 21, 2008, simultaneously with issuing its  
11 letter accepting defense of the criminal proceedings against Captain Cota, Continental filed its civil  
12 action for declaratory relief with this Court against Captain Cota and the Vessel Interests.

13 On or about June 13, 2008, Continental filed its First Amended Complaint against the same  
14 defendants. In the FAC, Continental asks this Court to (i) issue declaratory relief against Captain  
15 Cota declaring that Continental has no obligation to defend or indemnify Captain Cota in the  
16 criminal proceedings (FAC, Second Cause of Action) and (ii) enter a judgment requiring Captain  
17 Cota to reimburse Continental for any defense costs paid by Continental in connection with the  
18 criminal matters (FAC, Third Cause of Action). Additionally, Continental, in the first, fourth and  
19 fifth causes of action in the FAC, seeks declaratory relief against the Vessel Interests shifting any  
20 and all liability for defending and indemnifying Captain Cota in the civil and criminal matters  
21 arising from the COSCO BUSAN collision to the Vessel Interests.<sup>5</sup>

22 The FAC centers on precisely the same incident and facts at issue in the criminal proceeding  
23 against Captain Cota: the November 7, 2007 COSCO BUSAN accident and Captain Cota’s alleged  
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25 <sup>4</sup> Later, on April 22, 2008, the government filed a Superseding Indictment in the Criminal Action  
26 repeating the allegations in the original Information and adding felony charges for violation of 18  
27 U.S.C. § 1001 based on Captain Cota’s alleged false statements during medical examinations in  
28 January 2006 and January 2007. Schack Decl., ¶ 7, Exhibit “5.”

<sup>5</sup> Continental has also made Captain Cota a defendant in the fourth cause of action in the FAC  
seeking to shift defense and indemnity obligations for the criminal proceedings to the Vessel  
Interests.

1 role in that accident. Thus, the instant action pits Continental against its own insured, Captain Cota,  
 2 and is therefore forcing him to fight a two-front war—defending against the criminal claims of  
 3 government while simultaneously defending this action. Moreover, because this action seeks to  
 4 litigate the same facts as contained in the Criminal Action, Continental is thereby causing prejudice  
 5 to Captain Cota in his defense of the Criminal Action. Under these circumstances, Captain Cota is  
 6 entitled to a stay of this action for 120 days or until the trial in the Criminal Action is completed.<sup>6</sup>  
 7 Alternatively, the Court should order Continental’s claims against Captain Cota to arbitration and  
 8 stay the balance of the case until the completion of the arbitration.

9 **III. THE COURT SHOULD STAY THIS ACTION FOR 120 DAYS OR UNTIL**  
 10 **COMPLETION OF THE CRIMINAL ACTION AGAINST COTA.**

11 **A. Under Well-Established Law, The Civil Action Should Be Stayed Pending**  
 12 **Completion Of The Criminal Proceeding.**

13 “It is well-settled that a court has authority to stay civil proceedings, and that a proper  
 14 circumstance in which to exercise such authority is when a civil action threatens to interfere with a  
 15 related criminal case.” *AWS Management, LLC v. United States*, 2006 U.S. Dist. LEXIS 24894  
 16 (N.D.Cal) at 5; citing *U.S. v. Kordel*, 397 U.S. 1, 12, n. 27 (1970); See also *Wallace v. Kato*, 549  
 17 U.S. 384, 127 S.Ct. 1091, 1098 (2006) (“it is within the power of the district court, and in accord  
 18 with common practice, to stay the civil action until the criminal case or the likelihood of a criminal  
 case is ended”).

19 Although courts consider several factors in issuing stays, the first consideration is “the extent  
 20 to which the defendant’s Fifth Amendment rights are implicated.” *Keating v. Office of Thrift*  
 21 *Supervision*, 45 F.3d 322, 324 (9th Cir. 1995) (quoting *FSLIC v. Molinaro*, 889 F.2d 899, 902 (9th  
 22 Cir. 1989)). In addition, the decision maker should generally consider: “(1) the interest of the  
 23 plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the  
 24 potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the  
 25

26 <sup>6</sup> The criminal trial of the Clean Water Act and Migratory Bird Treaty Act charges is set for  
 27 October 6, 2008. On July 17, 2008, Judge Illston severed certain felony charges under 18 U.S.C. §  
 28 1001 (hereinafter the “Felony Charges”) and ordered that the Felony Charges be tried separately  
 after completion of the October 6 trial. At this time, Judge Illston has not set a new trial date for the  
 Felony Charges, and Captain Cota may need to seek additional relief relating to any stay of the  
 within action if and when Judge Illston sets a new trial date for those Felony Charges.

1 proceedings may impose on defendants; (3) the convenience of the court in the management of its  
2 cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil  
3 litigation; and (5) the interest of the public....” *Keating*, 45 F.3d at 324-25.

4 The strongest case for deferring civil proceedings “is where a party under indictment for a  
5 serious offense is required to defend a civil or administrative action involving the same matter.”  
6 *Cadence Design Systems, Inc. v. Avant!, Inc.*, 1997 U.S. Dist. LEXIS 24147 (N.D. Cal.) at 4; citing  
7 *SEC v. Dresser Industries, Inc.* 628 F.2d 1368 (D.C. Cir. 1980); *Jones v. Conte*, 2005 WL 1287017  
8 (N.D. Cal.) (Illston, J.). This motion seeks to address this exact scenario. First, the government has  
9 filed a formal Indictment against Captain Cota. Second, the Indictment charges Captain Cota with  
10 serious offenses, including both misdemeanors and felonies. Finally, the civil and criminal actions  
11 are not only related, but arise out of precisely the same incident: the COSCO BUSAN’s collision  
12 with the San Francisco Bay Bridge’s fendering system on November 7, 2007. See, e.g., FAC, ¶ 22.  
13 Continental’s central claim in the FAC is that it has no obligation to defend or indemnify Captain  
14 Cota for the charges in the criminal proceeding arising out of this incident. Among other things,  
15 Continental has asserted that the Continental Policy does not cover occurrences that (1) were not  
16 accidental, (2) were expected or intended by the pilot, or (3) were based on the pilot’s willful or  
17 intentional violation of any government rule or regulation. Schack Decl., ¶ 5. As such, Continental  
18 seeks to litigate in this action the very facts and issues that are at the heart of the Criminal Action:  
19 the events of November 7, 2007 and Captain Cota’s acts and omissions both leading up and during  
20 the COSCO BUSAN’s voyage that day. Captain Cota should not be required to defend the civil  
21 action while simultaneously defending himself in a criminal proceeding involving the same matter,  
22 and the relevant precedent uniformly supports a stay in this situation.

23 *Jones v. Conte*, 2005 WL 1287017 (N.D. Cal.) is illustrative. In *Jones*, the government  
24 brought a criminal case against Victor Conte and other criminal defendants alleging the unlawful  
25 distribution of performance-enhancing drugs. While under indictment, Conte made a series of  
26 statements in the print and television media regarding performance enhancing drugs and mentioned  
27 Marion Jones as one of the professional athletes using such drugs. As a result, Jones filed a separate  
28

1 suit against Conte alleging defamation and tortious interference with business relations against  
2 Conte. The cases were ordered related, and Conte brought a motion to stay the civil case until  
3 resolution of the criminal case. After hearing the motion, Judge Illston—who is, coincidentally, the  
4 trial judge in the Criminal Action against Captain Cota—entered an order staying the civil action  
5 finding that both the criminal case and the civil case arose from the same facts—the alleged illegal  
6 distribution of drugs by Conte. Judge Illston held that a stay was proper because, if discovery in the  
7 civil case moved forward, the defendant, Conte, would be faced with the “difficult choice” between  
8 asserting his right against self-incrimination thereby inviting prejudice in the civil case or waiving  
9 his right against self-incrimination thereby inviting prejudice in the criminal case. Judge Illston also  
10 found that other relevant factors supported the stay:

11 “To the extent the remaining factors are implicated in this case, they turn in favor of  
12 defendant. Staying the case makes efficient use of judicial resources by “insuring that  
13 common issues of fact will be resolved and subsequent civil discovery will proceed  
14 unobstructed by concerns regarding self-incrimination. [Cite.] Furthermore, the public  
15 interest is furthered by a stay because ‘the public’s interest in the integrity of the criminal  
16 case is entitled to precedence over the civil litigant.’ [Cite.] Therefore, the Court finds that a  
17 stay ensures the efficient use of judicial resources and supports the public interest.” *Jones*,  
18 *supra*, 2005 WL 1287017 at 2.

19 The same factors present in *Jones* are even more compelling here to protect Captain Cota  
20 from being prejudiced by Continental, his own insurer. Here, there is no question that permitting the  
21 civil action to proceed at the same time as the criminal proceeding would impact Captain Cota’s  
22 Fifth Amendment rights. If Continental’s civil action proceeds, Captain Cota would be forced to  
23 choose between participating in discovery and waiving his Fifth Amendment rights, or not  
24 participating in the benefits of discovery and maintaining such rights. Staying the civil action during  
25 the criminal proceeding would obviously alleviate this conflict. Moreover, staying the civil action  
26 will not cause any judicially-recognized prejudice to Continental. First, because Continental is  
27 seeking a judicial determination of its coverage obligations, the civil action is essentially a monetary  
28

1 dispute. Courts have recognized that monetary prejudice is not a factor that weighs heavily in favor  
2 of denying a stay of a civil action. *Belford Strategic Investment Fund, LLC v. Presidio Growth LLC*,  
3 2005 U.S. Dist. LEXIS 45219 (N.D. Cal.) at 4-5. Further, courts recognize that, in general, the risk  
4 of prejudice is lessened after the filing of a criminal indictment “because of the requirement of a  
5 speedy trial, which limits the duration of the stay.” *Lizarraga v. City of Nogales*, 2007 U.S. Dist.  
6 LEXIS 90055 (D. Ariz.) at 6. Here, trial is set to begin on October 6, 2008 on the negligence and  
7 Migratory Bird counts. Therefore a stay of 120 days is reasonable.<sup>7</sup> A temporary stay of this length  
8 does not cause Continental any undue prejudice.

9 Additionally, issuance of a stay would serve the interests of judicial economy in several  
10 ways. *Grubbs v. Irely*, 2008 U.S. Dist. LEXIS 26758 (E.D. Cal.) at 14-15 (the Court has “inherent  
11 discretionary authority to stay cases to control its docket in the interests of justice and efficiency.”).  
12 A stay would eliminate unnecessarily duplicative litigation, would avoid inconsistent rulings and  
13 may serve to streamline issues in the subsequent civil proceeding. *Id.* In addition, a stay would  
14 obviate the need to make rulings regarding potential discovery disputes involving issues that will  
15 almost certainly affect the criminal case. A stay pending resolution of criminal proceedings is also  
16 likely to remove Fifth Amendment concerns and thereby permit the civil action to proceed more  
17 smoothly. See *Grubbs, supra*, 2008 U.S. Dist. LEXIS at 15-16.

18 Finally, both the public in general, and Captain Cota in particular, have a strong interest in  
19 the orderly and efficient administration of the criminal proceeding. Indeed, courts have recognized  
20 that trial judges “should give substantial weight to [the public interest in law enforcement] in  
21 balancing that policy against the right of a civil litigant to a reasonably prompt determination of his  
22 civil claims.” *Belford, supra*, 2005 U.S. Dist. LEXIS at 12; citing *Twenty First Century Corp. v.*  
23 *LaBianca*, 801 F. Supp. 1007, 1010 (EDNY 1992). Further, where the civil and criminal matters  
24 overlap, such that the civil case may impede the criminal one, “the public’s interest in the integrity  
25 of the criminal case is entitled to precedence over the civil litigant” and “the public interest is best  
26 served by staying the civil matter.” *Id.* Here, the issues in the civil and criminal actions  
27

28 <sup>7</sup> As to the Felony Charges, which have been severed from this trial, see footnote 6, *supra*.  
9.



1 fundamentally overlap—the civil action will almost certainly impede the criminal proceeding.  
 2 Accordingly, the public’s interest is best served by staying the civil action.

3 In light of the foregoing, the Court should stay this action for 120 days to allow the  
 4 completion of the Criminal Action.<sup>8</sup>

5 **B. The Applicable Law Governing Insurance Coverage Disputes Also Supports a**  
 6 **Stay of Continental’s Action Until Completion of the Underlying Criminal**  
 7 **Litigation.**

8 In *Montrose Chemical Corporation of California v. Superior Court* (1993) 6 Cal.4<sup>th</sup> 287, the  
 9 California Supreme Court expressly held that an insurer cannot pursue a declaratory relief action  
 10 where factual determinations in that proceeding could prejudice the insured:

11 “To eliminate the risk of inconsistent factual determinations that could prejudice the insured,  
 12 a stay of the declaratory relief action pending resolution of a third party suit is appropriate  
 13 when the coverage turns on facts to be litigated in the underlying action. (*See, e.g., California*  
 14 *Ins. Guarantee Ass’n. v. Superior Court* (1991) 231 Cal. App. 3d 1617, 1627-28, 283 Cal.  
 15 *Rprt.* 104; *General of America Ins. Co. v. Lilly* (1968) 258 Cal. App. 465, 471, 65 Cal. Rptr.  
 16 750.) For example, when the third party seeks damages on account of the insured’s  
 17 negligence, and the insurer seeks to avoid providing a defense by arguing that its insured  
 18 harmed the third party by intentional conduct, the potential that the insurer’s proof will  
 19 prejudice its insured in the underlying litigation is obvious. This is the classic situation in  
 20 which the declaratory relief action should be stayed.” *Montrose*, 6 Cal.4<sup>th</sup> at 301-02.

21 The California Court of Appeal, in *David Kleis, Inc. v. Superior Court* (1995) 37 Cal.App.4<sup>th</sup>  
 22 1035, discussed further the rationale for staying an insurer’s declaratory relief action while the  
 23 underlying litigation involving the insured was still pending:

24 “There are three concerns which the courts have about the trial of coverage issues which  
 25 necessarily turn upon the facts to be litigated in the underlying action. First, the insurer, who  
 26 is supposed to be on the side of the insured and with whom there is a special relationship,

27 <sup>8</sup> While Captain Cota seeks a 120-day stay to allow completion of the Criminal Action, it is Captain  
 28 Cota’s position that, at the end of the stay, this Court must order all claims between Continental and  
 Captain Cota to arbitration. See Part III, *infra*.

1 effectively attacks its insured and thus gives aid and comfort to the claimant in the  
2 underlying suit; second, such a circumstance required the insured to fight a two front war,  
3 litigating not only with the underlying claimant, but also expending precious resources  
4 fighting an insurer over coverage questions—this effectively undercuts one of the primary  
5 reasons for purchasing liability insurance; and *third*, there is a real risk that, if the declaratory  
6 relief action proceeds to judgment before the underlying action is resolved, the insured could  
7 be collaterally estopped to contest issues in the latter by the results in the former.” 37  
8 Cal.App.4<sup>th</sup> at 1044-45.

9 Here, the factors identified by the California Supreme Court in *Montrose* and the Court of  
10 Appeal in *Kleis* support staying this action until the trial in the Criminal Action is completed. First,  
11 Continental, in its correspondence with Captain Cota, has contended that coverage is not available  
12 for Captain Cota under the Continental Policy because Captain Cota’s conduct – which is the subject  
13 of the Criminal Action – is intentional, willful and non-accidental and is thereby excluded by the  
14 Pollution Exclusion. However, the Clean Water Act and Migratory Bird Treaty Act, on which the  
15 government seeks to impose criminal liability in the first instance on Captain Cota sound in  
16 negligence and strict liability and, according to the government, do not require intentional, willful  
17 conduct to impose criminal liability. As such, Continental will seek to avoid coverage in the within  
18 action by seeking to prove that Captain Cota’s conduct in piloting the COSCO BUSAN—i.e., the  
19 conduct at issue in the Criminal Action—was willful and intentional. Obviously, by seeking to  
20 prove such conduct, Continental will be prejudicing Captain Cota in the Criminal Action, and this  
21 scenario thus presents the “classic situation” identified by the California appellate courts in  
22 *Montrose* and *Kleis* where a stay of the insurer’s coverage action is appropriate.

23 Moreover, Continental, by the within action, is causing Captain Cota to fight a two-front war  
24 with the government and his own carrier at a time when he is least able to do so. This is precisely  
25 the situation that the Court of Appeal in *Kleis* identified as inappropriate. Moreover, this prejudice  
26 can be avoided if Continental’s action herein is simply stayed for 120 days to allow completion of  
27 the trial in the Criminal Action. Continental can hardly claim any prejudice by such a delay, and at  
28



1 the end of the stay, Continental will be required, in any event, to adjudicate any claims against  
2 Captain Cota in an arbitration as required by the Continental Policy and not in the instant lawsuit  
3 filed against Captain Cota here.

4 The federal courts in California have embraced the same reasoning in staying declaratory  
5 relief actions brought by insurers until the underlying litigation against the insured is concluded.  
6 *Metropolitan Direct Property and Casualty Insurance Company v. Synigal*, 2008 U.S. Dist. LEXIS  
7 8916 (N.D. Cal.), is squarely on point. In *Metropolitan*, an insurance company filed a civil  
8 declaratory relief action against its insured seeking a judicial determination that coverage did not  
9 exist for wrongful death claims against the insured in a criminal proceeding. Although the insurer  
10 had accepted coverage, it had done so under a reservation of rights with respect to intentional and/or  
11 criminal acts. The insured filed a motion to stay the civil declaratory relief action pending the  
12 outcome of the criminal action. The court granted the stay, finding that the question of whether the  
13 insured acted deliberately and intentionally is “central to the question of coverage under the policy,  
14 as well as to the resolution of both the state criminal and civil actions.” *Id.* at 6. The court reasoned  
15 that allowing the declaratory action to proceed at the same time as the criminal action would result in  
16 unnecessary, duplicative litigation. *Id.*

17 The present case is substantively identical to *Metropolitan*. Continental, after accepting  
18 Captain Cota’s tender of defense and indemnity, now seeks a judicial declaration of its insurance  
19 obligations. It is clear from Continental’s correspondence that the civil action will focus on the  
20 precise events at issue in the criminal proceeding, including Captain Cota’s decisions, actions and  
21 omissions and whether he acted intentionally and/or willfully. As in *Metropolitan*, forcing Captain  
22 Cota to defend these claims on two fronts would be unnecessarily duplicative.

23 Accordingly, the Court should stay Continental’s action herein for 120 days pending  
24 resolution of the criminal proceeding.<sup>9</sup>

25  
26  
27 <sup>9</sup> Captain Cota has recently learned that the Vessel Interests have filed counterclaims, cross-claims  
28 and third-party claims in this action which address substantially the same issues raised by  
Continental. Counsel for Captain Cota had not seen any service copy of the Vessel Interests claims  
by July 18, 2008 before this motion was filed. However, Captain Cota does seek a stay of the entire  
action before this Court including any claims by the Vessel Interests.

1 **IV. ALTERNATIVELY, THE COURT SHOULD COMPEL CONTINENTAL TO**  
 2 **ARBITRATE ITS CLAIMS AGAINST COTA AND SHOULD STAY THIS CASE**  
 3 **UNTIL THE COMPLETION OF SUCH ARBITRATION.**

4 As set forth above, applicable law strongly supports staying the within action for 120 days  
 5 pending completion of the Criminal Action. Should the Court decline to do so, Captain Cota  
 6 requests that the Court immediately order that Continental arbitrate its claims against Captain Cota  
 7 as required by the Continental Policy.

8 The Continental Policy contains a broad arbitration clause which provides that “[i]f any  
 9 dispute arises under this policy the parties hereto shall submit the same to arbitration.” Schack  
 10 Decl., ¶ 2-3. Under the Federal Arbitration Act (“FAA”), “[a] written provision in any...contract  
 11 evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising  
 12 out of such contract or transaction, or the refusal to perform the whole or any part thereof,...shall be  
 13 valid, irrevocable, and enforceable....” 9 U.S.C. § 2. There is a clear federal policy supporting  
 14 enforcement of arbitration clauses. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.* 207 F.3d 1126, 1131  
 15 (9th Cir. 2000). Further, arbitration clauses are to be interpreted broadly. *See, e.g., Simula, Inc. v.*  
 16 *Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir. 1999). When assessing whether claims should be  
 17 arbitrated, courts presume “that the parties agreed to submit the dispute to arbitration unless there is  
 18 clear intent that the parties did not want to arbitrate [the] matter.” *Teamsters Local Union No. 688 v.*  
 19 *Industrial Wire Products, Inc.*, 186 F.3d 878, 881 (8th Cir. 1999) (quoting *First Options of Chicago,*  
 20 *Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S. Ct. 1920 (1995)).

21 Continental’s claims against Captain Cota in this action “arise under” the Continental Policy.  
 22 One need look no further than the FAC’s first paragraph, which states that the action concerns “a  
 23 contract of marine insurance.” FAC, ¶ 1. Continental further alleges in the FAC that Captain Cota  
 24 is a member of the Bar Pilots, and that Continental provides insurance to the Bar Pilots and its  
 25 individual members, including Captain Cota. FAC, ¶ 10-11. The FAC alleges that the COSCO  
 26 BUSAN accident occurred while Captain Cota was onboard as a pilot. Most importantly, each form  
 27 of relief Continental seeks in the FAC – whether it is indemnity, reimbursement or a declaration of  
 28 coverage obligations – necessarily involves an analysis of the Continental Policy and its application

1 to the facts of the COSCO BUSAN accident. As such, all claims and causes of action by  
2 Continental against Captain Cota fall squarely within the scope of the Continental Policy's  
3 arbitration provision. Accordingly, the Court should compel Continental to arbitrate its claims  
4 against Captain Cota.

5 Where claims in a pending suit are subject to arbitration, the FAA requires such suit to be  
6 stayed pending the outcome of the arbitration. 9 U.S.C. § 3 ("If any suit or proceeding brought in  
7 any of the courts of the United States upon any issue referable to arbitration under an agreement in  
8 writing for such arbitration, the court in which such suit is pending . . . shall on application of one of  
9 the parties stay the trial of the action until such arbitration has been had in accordance with the terms  
10 of the agreement . . ."). Here, upon the granting of his motion to compel arbitration, Captain Cota  
11 is entitled to a mandatory stay of all claims being asserted in this pending action by Continental  
12 against him.

13 In addition to the claim asserted against Captain Cota, Continental has also asserted claims  
14 against the Vessel Interests in the first, fourth and fifth causes of action. The Vessel Interests are not  
15 a party to Continental Policy and are not subject to the arbitration clause in the Continental Policy.  
16 The existence of these claims against the Vessel Interests, however, do not affect Captain Cota's  
17 right to compel arbitration of Continental's claim against him. As the Supreme Court has held, "an  
18 arbitration agreement must be enforced notwithstanding the presence of other persons who are  
19 parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Memorial*  
20 *Hosp. v. Mercury Const. Corp.*, 460 U.S.1, 20 (1983).

21 Moreover, the Court should stay all remaining claims against the Vessel Interests pending  
22 completion of the arbitration between Continental and Captain Cota because the failure to do so will  
23 create the possibility of inconsistent results and prejudice to Cota and will be a waste and inefficient  
24 use of this Court's resources. Indeed, as recognized by the U.S. Supreme Court: "[i]n some cases, of  
25 course, it may be advisable to stay litigation among the nonarbitrating parties pending the outcome  
26 of the arbitration. That decision is one left to the district court...as a matter of discretion to control  
27 its docket." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20, fn  
28

23 (1983); *See also United States use of Newton v. Neumann Caribbean International, Ltd.*, 750 F.2d 1422, 1426-27 (9<sup>th</sup> Cir. 1985)(finding that “considerations of economy and efficiency fully support the District Court’s determination that the third party claim [i.e. the non-party to the arbitration clause] and other matters must await the final determination made in connection with the arbitration”); *Harvey v. Joyce*, 199 F.3d 790, 795-96 (5<sup>th</sup> Cir. 2000). Here, Continental’s claims against the Vessel Interests involve factual and legal issues that overlap with the claims against Captain Cota which must be arbitrated. For example, in the fourth cause of action against both Captain Cota and the Vessel Interests, Continental seeks declaratory relief that, if Continental has an obligation to defend and indemnify Captain Cota in connection with the criminal proceedings, then the Vessel Interests must contribute to that indemnity and defense because its obligations to do so are primary pursuant to California Harbors & Navigations Code § 1198. Similarly, in its fifth cause of action for indemnity against the Vessel Interests, Continental alleges that, if it is obligated to defend and indemnify Captain Cota in connection with the criminal proceedings, then the Vessel Interests, under Harbors & Navigations Code, have an obligation to reimburse Continental for any monies paid to Captain Cota for such indemnity and defense. Thus, a threshold issue in Continental’s claims against the Vessel Interests in those causes of action is whether Continental has a coverage obligation to Captain Cota under the Continental Policy for the criminal claims against Captain Cota. This issue must be resolved in the arbitration between Continental and Captain Cota and allowing Continental’s claims against the Vessel Interests to proceed prior to such determination in arbitration (and potentially adjudicate the very issue that is the subject of the arbitration) would thwart the federal policy favoring arbitrations, would create the possibility of inconsistent results and would be an inefficient and wasteful use of judicial resources. Under these circumstances, the Court has the power to, and should, stay all remaining claims in this action involving the Vessel Interests and other parties pending completion of the arbitration between Continental and Captain Cota. *Id.*; *Kroll v. Doctor’s Associates, Inc.*, 3 F.3d 1167, 1171 (7<sup>th</sup> Cir. 1993).

1 **V. IF THE COURT DENIES THIS MOTION, CAPTAIN COTA REQUESTS AN**  
2 **EXTENSION OF TIME TO RESPOND TO CONTINENTAL'S FIRST AMENDED**  
3 **COMPLAINT.**

4 In the event the Court denies this motion, and neither stays the civil action nor orders  
5 Continental and Captain Cota to arbitrate this matter, then Captain Cota respectfully requests that the  
6 Court order that Captain Cota have ten (10) days from the notice of such ruling in which to respond to  
7 Continental's First Amended Complaint.

8 **VI. CONCLUSION.**

9 For the foregoing reasons, the Court should stay the within action for 120 days, or  
10 alternatively, compel Continental to arbitrate all of its claims against Captain Cota while staying all  
11 other claims by all parties until completion of the arbitration.

12 Respectfully submitted,

13 K&L GATES LLP

14 By /s/ David P. Schack  
15 David P. Schack, Esq.  
16 Attorneys for Defendant  
JOHN J. COTA

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